

Revenue Rulings

Transfer of dutiable property from a deceased estate

Revenue Ruling DA.051

Ruling history	
Ruling no.	DA.051
Status	Current
Issued date	March 2010
Replaces	DA.013, DA.018
Dates of effect	
From	30 March 2010
To	-

Preamble

Section 10(1) of the *Duties Act 2000* (the Act) defines the term 'dutiable property' to include an interest under a will or codicil of a deceased person disposing of property. A transfer of such an interest constitutes a dutiable transaction under section 7 of the Act and is subject to duty unless an exemption applies.

Section 42(1) of the Act exempts from duty a transfer of dutiable property not made for valuable consideration by the legal personal representative of a deceased person to a beneficiary, where the transfer is made under and in conformity with the trusts contained in a will or arising on an intestacy, or the transfer relates to a property that is the subject of a trust for sale contained in the will of the deceased person.

Section 42(2) of the Act exempts from duty the vesting of any dutiable property by virtue of section 13 of the *Administration and Probate Act 1958* (APA) (which deals with the vesting of dutiable property in the executor or administrator to whom probate or administration has been granted).

Section 42(3) of the Act exempts from duty a transfer of dutiable property not made for valuable consideration by a legal personal representative of a deceased person to a beneficiary to the extent that the transfer is made in satisfaction of the beneficiary's entitlement arising under the will of the deceased person or arising on an intestacy.

The purpose of this Revenue Ruling is to explain the operation of section 42 of the Act following legislative amendments made to it by the *State Taxation Acts Amendment Act 2009*. It also explains the different approaches applied by the State Revenue Office (SRO) in determining the dutiable value of property where the exemptions in section 42 of the Act are found not to apply.

Ruling

The underlying policy intent behind section 42 of the Act is to exempt from duty the transfer of otherwise dutiable property from a deceased estate, so long as the transfer is made pursuant to the last wishes of the deceased.

Whether the exemptions in section 42 apply, and to what extent, is not always clear where beneficiaries agree to alter the distribution of gifts under a will or on an intestacy. Depending on the circumstances of a particular matter, there are two possible approaches that can be applied by the SRO in determining these questions. These approaches are referred to as the 'Each Asset' approach and the 'All Assets' approach.

The 'Each Asset' approach

This approach is applied to transfers of specific gifts of identified property to nominated individuals in the will of the deceased. A transfer is exempt from duty to the extent of the beneficiary's entitlement in the property transferred. Duty is imposed on the amount by which the entitlement to the property is exceeded.

Example 1

A will provides that 'Tom gives his property Whiteacre (valued at \$500,000) to Sarah and his shares (valued at \$400,000) and cash (\$100,000) to Nicole'. The parties enter into a Deed of Family Arrangement to swap gifts.

The legal personal representative transfers Whiteacre to Nicole and the shares and cash to Sarah.

As Nicole was not entitled to Whiteacre under the will, using the 'Each Asset' approach, Nicole received 100 per cent more than her entitlement to the property. As such, section 42 of the Act does not apply and duty will be assessed on the full value of the property transferred to Nicole (i.e. \$500,000).

The 'All Assets' approach

This approach is applied to transfers of residuary gifts under a will (that is, gifts that remain after distribution of the specific gifts, often to a class of beneficiaries in set proportions) and to transfers of property on intestacy.

A transfer is exempt to the extent of the beneficiary's entitlement to the assets of the estate. Duty is imposed on the amount by which such entitlement is exceeded.

Example 2

The residual estate under a will comprises cash (\$100,000) and land (valued at \$150,000), totalling \$250,000.

The will provides that the deceased's surviving children, John and Michael, are entitled to the residual estate in equal shares, being \$125,000 each. By a Deed of Family Arrangement the land is transferred to John and the cash to Michael.

Applying the 'All Assets' approach, as the land transferred to John (valued at \$150,000) exceeds his entitlement in the residual estate under the will by \$25,000, duty is assessed on this additional amount.

If, in this example, the cash amount was \$150,000 and the land was valued at \$100,000, and assuming the same Deed of Family Arrangement, duty would not be payable by John as the value of the land is only \$100,000 (i.e. \$25,000 less than John's entitlement under the will). Duty would not be payable by Michael either, even though he has exceeded his entitlement by \$25,000, as cash does not constitute dutiable property under the Act.

Example 3

A will provides that 'Tom gives all his estate to Sarah and Nicole in equal shares'. The residuary estate comprises land (valued at \$500,000), shares (valued at \$400,000) and cash(\$100,000), totalling \$1,000,000.

The beneficiaries enter into a Deed of Family Arrangement and the legal personal representative transfers the land to Sarah and the shares and cash to Nicole.

Applying the 'All Assets' approach, Sarah and Nicole are entitled to \$500,000 each. As the land is valued at \$500,000, Sarah's entitlement in the residual estate has not been exceeded. An exemption under section 42 of the Act applies and no duty is payable.

Transfers made under a will for consideration

The entitlement of a beneficiary under a will may be conditional upon a payment being made.

Where a beneficiary's entitlement is conditional upon the beneficiary paying certain monies, either to the estate or a third party, the terms of the will must be strictly complied with for the exemption to apply.

Example 4

A testator with two children, Steve and Jane, bequeaths Blackacre (valued at \$200,000) to her son Steve on condition that he pays \$100,000 to his sister Jane. If Steve pays the \$100,000 to Jane and takes a transfer of Blackacre, it is treated as exempt under section 42 of the Act. This is because the transfer of Blackacre to Steve is considered to have been made in conformity with the will.

If, however, Steve only pays \$80,000 to Jane, this is not considered to be in conformity with the will. As a result, section 42 would not apply and the transfer of Blackacre would be fully dutiable.

Example 5

A testator bequeaths Greenacre (valued at \$500,000) to Nicole on condition that she pays \$100,000 to John. Nicole assigns her right to Greenacre to Michael. Michael pays \$100,000 to John and subsequently takes a transfer of Greenacre. As the transfer is not in strict conformity with the will, section 42 of the Act does not apply. The transfer is assessed to full ad valorem duty on \$500,000.

Claims made under Part IV of the Administration and Probate Act 1958 (APA)

In some cases a transfer of dutiable property by the legal personal representative of a deceased person may arise pursuant to an order made as a result of an application to the Supreme Court or the County Court under Part IV of the APA for the proper maintenance and support of a person for whom the deceased had responsibility to make provisions. The Court can make an order for such provisions to be made out of the estate of a deceased person, which may involve the transfer of dutiable property.

Section 97(4) of the APA provides that an order made by the Court under Part IV of the APA has effect as a variation to the deceased's will or the intestacy rules. Accordingly, where a transfer of dutiable property by the legal personal representative of a deceased person pursuant to a court order made under Part IV of the APA is in conformity with the order, the transfer will be exempt from duty under section 42 of the Act.

However, if an order is made by the Court dismissing a Part IV application (for example, where the parties have settled the distribution of the estate out of Court), there is no variation to the will or intestacy rules. Where this occurs, the entitlement to the exemptions contained in section 42 of the Act will depend on the facts and circumstances of each individual case.

Please note that rulings do not have the force of law. Each decision made by the State Revenue Office is made on the merits of each individual case having regard to any relevant ruling. All rulings must be read subject to Revenue Ruling GEN.001.